84-1291

NO.

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR., and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Did the Florida Courts deprive Petitioners of equal protection of the law in applying common law principles dealing with purging usury and waiver to this case, rather than Florida's Criminal Usury Statute which would require a finding of usury and entry of Judgment for Petitioners.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully request that a Writ of

Certiorari issue to review the opinions and orders of the Fourth District Court of Appeal of Florida and the Florida Supreme Court. Those decisions enforce the common law in a usury case rather than a state usury statute, which is directly applicable and which would require a finding of usury and entry of judgment in Petitioners' favor, thereby denying Petitioners' constitutional right to equal protection of the law.

RELEVANT OPINIONS AND ORDERS BELOW

A) The trial court's Order Granting Partial Summary Judgment dated January 7, 1983 (Appendix H).

B) The Final Judgment dated January 31, 1983 (Appendix I).

C) The trial court's Order Denying Motion to Set Aside Stipulation (Appendix L).

D) The Fourth District Court of Appeal's Order affirming the trial court citing to *GUNN PLUMBING, INC. V. DANIA BANK*, 252 So.2d 1 (Fla. 1971) (Appendix M).

E) Florida Supreme Court Order Denying Petition for Certiorari (Appendix P).

F) Florida Supreme Court Order Denying Motion for Reinstatement (Appendix V).

JURISDICTION

The decision of Florida's Fourth District Court of Appeal, affirming the Final Judgment of the trial court was entered on May 9, 1984 (Appendix M), and the court's

denial of rehearing was entered July 11, 1984 (Appendix N). Review was thereafter sought in the Florida Supreme Court which court declined to accept discretionary jurisdiction (Appendices O and P), and refused to accept a direct ruling that the Fourth District had not declared invalid a State statute (Appendices Q and R). A Motion for Reinstatement (Appendix S) was denied November 5, 1984 (Appendix V). The Florida Supreme Court's rejection, for want of jurisdiction, of Petitioner's attempt to seek review in that court results in the decision of the Fourth District being rendered by the highest court of Florida in which review can be had. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1

STATUTORY PROVISION INVOLVED

The statute involved is §687.071 Florida Statutes, which provides in pertinent part:

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.

* * * *

(7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

STATEMENT OF THE CASE AND FACTS

Respondent (the "Lenders") loaned money to Petitioners (the "Borrowers") at usurious interest rates. One promissory note was executed on February 20, 1981 by the Borrowers for $20,000, plus interest charged for 14 days in the amount of $3,800 for a total of $23,800 (Appendix J). The effective interest rate for the transaction was 495.3% per annum (Appendix J). The note was not repaid and a new note was executed on March 4, 1981 for the principle amount of $23,800 payable within 14 days with interest (labeled "profit") of $4,370 for a total of $28,170 (Appendix J). The effective interest rate was 478.7% per annum. The note was not repaid and a new note was executed on March 17, 1981 for $28,170 plus interest (labeled "profit") of $5,281.18 for a total of $33,551.18 (Appendix J). Therefore, on the $20,000 loan the interest charged from February 20, 1981 to March 31, 1981 was $13,551.18 (Appendix J). These loans are but examples of the many loans made to the Borrowers by the Lenders and now total $226,000. The interest on the loans ranged anywhere from 114% to 1,161% per annum.

The Lenders filed suit against the Borrowers for nonpayment of the promissory notes. During the course of that lawsuit the parties entered into a settlement as contained in a Stipulation, which set forth therein the amount owed on each of the usurious notes, plus interest; and further set forth a payment schedule for payment of each of the usurious notes, plus interest (Appendix A). The Stipulation also provided that repayment of the usurious notes and interest was secured by conveyances of time share units in the Barefoot Mailman Hotel and Resort (Appendix A).

The Borrower failed to make payment as agreed to under the Stipulation and the Lender filed another law suit to compel delivery of the time-share units which had been conveyed in the Hotel and Resort (Appendix A). The Borrowers raised as an affirmative defense that the underlying notes had charged usurious interest (Appendix B). The Borrowers also filed a counterclaim against the Lenders to have the notes declared unenforceable as being usurious (Appendices B and C). The Lenders moved to dismiss and strike the Borrowers' affirmative defenses and counterclaim alleging that the Borrowers had waived the right to rely upon usury as a defense by entering into the Stipulation (Appendix D). The trial court granted the motion and struck the Borrowers' affirmative defenses and counterclaim (Appendix E). The Lenders then filed a Motion for Summary Judgment based upon the Stipulation (Appendix F). In response, the Borrowers filed a Motion to Set Aside the Stipulation in both the action filed to enforce the Stipulation, and in the original court action in which the Stipulation had been entered, on the ground that the Stipulation was usurious and unenforceable under §687.071 F.S., Florida's Criminal Usury Statute, which provides in pertinent part:

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding forty-five percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in Sec. 775.083, Sec. 775.083 or Sec. 775.084.

* * * *

(7) *No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.*

The trial court subsequently denied the Borrowers' Motion to Set Aside the Stipulation in the action that was filed to enforce the Stipulation, granted the Lenders' Motion for Summary Judgment and entered Final Judgment thereon (Appendices G, H, and I).

In the original action on the notes the trial court likewise denied the Borrowers' Motion to Set Aside the Stipulation. It is important to note that the court did not make a determination that the notes were not usurious. Rather the court made the assumption that they were, but nonetheless decided that the usury had been purged by entry into a new, independent and separate obligation (the Stipulation), citing to *GUNN PLUMBING, INC. V. DANIA BANK,* 252 So.2d 1 (Fla. 1971) which incorporated the common law principle pertaining to purging usury (Appendix K).

> *...irrespective of the usurious nature of the notes* which formed the basis of the prior litigation, the written stipulation for settlement of that litigation constituted a new, independent and separate

> obligation in lieu and in place of the prior obligation, the effect of which was to eliminate any vice that was inherent in any of the prior and underlying obligations. In making that determination the court relied primarily on the case of *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla. 1971).

The Borrowers appealed to the Fourth District Court of Appeal. The Borrowers argued that *GUNN PLUMBING* had been decided prior to the enactment of §687.071 F.S. and therefore *GUNN PLUMBING* was no longer controlling. Rather, the public policy of the State of Florida, as dictated by §687.071(7) refused to allow a usurious loan to be enforced in the Florida courts of this state. In affirming, the Fourth District Court of Appeal found the common law set forth in the *GUNN PLUMBING* decision controlling, rathaer than the Florida Statute, §687.071, thus depriving Petitioners of the equal protection of the law. One Judge dissented, without opinion.

Petitioners arguments before the Fourth District Court of Appeal raised the arguments here presented but were rejected by that Court, by its reliance upon *GUNN PLUMBING.*

The Borrowers filed a Petition for Certiorari with the Florida Supreme Court which was denied (Appendices O and P), and a direct appeal contending that the Fourth District had inherently held §687.071(7) invalid, as applied to this case (Appendix Q). The Florida Supreme Court dismissed the direct appeal, finding that it did not appear that the Fourth District had declared the Statute invalid. The Dismissal was subject to reinstatement if jurisdiction was established upon proper motion (Appendix R). Petitioners filed a Motion for Reinstatement (Appendix S),

which was denied (Appendix V). The Florida Supreme Court's rejection, for want of jurisdiction, of Petitioner's attempt to seek review in that court resulted in the Fourth District being the highest court of Florida in which review could be had.

REASONS FOR GRANTING THE WRIT

This case presents squarely and unequivocally the issue of the right of a state, under the Equal Protection Clause of the Fourteenth Amendment, to provide dissimilar treatment for Petitioners by failure to apply §687.071(7) F.S. which prohibits, without qualification or condition, enforcement of a usurious transaction in the State of Florida. In *FERRIS V. FROHMAN,* 32 S.Ct. 263, 223 U.S. 424, 56 L.Ed 492 (1912) this Court held that where a decision of a state court enforcing common law rights violated a federal (here constitutional) right it was reviewable by certiorari and reversible.

In 1969 Florida's Criminal Usury Statute was amended to provide in §687.071(7) that a usurious loan would not be an enforceable debt in the State of Florida. The trial court and the Fourth District failed to apply the statute. Both courts relied upon the prior decision in *GUNN PLUMBING,* which incorporated common law principles. §687.071 F.S. was controlling. The statute was enacted in 1969, and the promissory notes involved in *GUNN PLUMBING* were executed prior to that date, so the statute was not applicable to, nor discussed in, *GUNN PLUMBING.* §687.071 encompasses the public policy of the state of Florida as of 1969. The statute protects Florida citizens who may not be in a position to protect themselves when dealing with lenders. It unequivocally provides that no usurious debt will be enforced in this state. This

statutory provision which was passed to strengthen Florida's usury laws is not subject to waiver and cannot be held inapplicable under a "purging" theory.

COMMON LAW PRINCIPLES CANNOT BE APPLIED TO EMASCULATE §687.071

GUNN PLUMBING essentially stands for two propositions: a usurious contract can be purged by usury by a new contract where the old obligation is abandoned and a new one is entered into free from the vice of the old; and the defense of usury can be waived by virtue of entering into a later contract.[1]

The common law principles set forth in *GUNN PLUMBING* are not applicable to this case for several

[1] In the present case, unlike *GUNN PLUMBING* the old usury was carried forward into the new contract. The Stipulation entered into by the parties specifically set forth the amount owed each of the lenders *under the old usurious notes* (Appendix A). The Stipulation then merely set forth a new payment arrangement, but the old obligations continued. They were never abandoned. The old obligations were reiterated and incorporated into pages 1-2 of the Stipulation. Therefore, under *GUNN PLUMBING* the new Stipulation was clearly tainted by the old usury.

The court in *GUNN PLUMBING* also relied upon the fact that the borrowers took no affirmative action to rescind, reform or void the terms of the settlement stipulation. The Borrowers in the present case did so, by filing Motions to Set Aside the Stipulation in both the original action wherein the Stipulation was entered, and in the later suit to enforce the Stipulation.

GUNN PLUMBING also held that the settlement agreement entered into by the parties *specifically* provided that the defense of usury raised by the borrower was being withdrawn and that the borrowers admitted they had no defenses, counterclaims or set-offs, and admitted that they owed the lender the amount claimed. The Court concluded that by the particular language of the settlement agreement the borrowers had specifically waived their right to later rely upon the defense of usury. In the present case the borrowers did not waive their usury defense by any language in the Stipulation.

reasons. First, those common law principles cannot be used to emasculate the clear public policy of the State of Florida as set forth in §687.071(7) that no usurious contract will be enforced in the State of Florida. In *CRAWFORD V. CARLTON,* 422 NYS 2d 402 (Sup. Ct. 1979) the court held that a statute which provides that the return of excess interest is a bar to further penalties cannot be used or construed to emasculate a later statute providing that usurious contracts are void. As applied to this case it can be said that Florida's common law decisions dealing with purging usury by a new contract or waiving usury cannot be used to emasculate §687.071(7) F.S. which provides that no usurious contracts will be enforced in Florida.

Nor can Florida's Criminal Usury Statute, §687.071, be waived. Rights granted by a statute cannot be waived where the statute is intended to protect the general rights of the public. *HALSRUD V. BRODALE,* 247 Iowa 273, 72 N.W. 2d 94 (1955); *WELLENS V. BECK,* 103 N.W. 2d 281 (N.D. 1960). Requirements of a statute enacted for the public good cannot be nullified or varied by private contract. *SCHOOL DISTICT V. TEACHER'S RETIREMENT FUND ASSN.,* 163 Or. 103, 95 P.2d 720, 96 P.2d 419 (1939); *GRANDVIEW INLAND FRUIT CO., HARTFORD, F. INS., CO.,* 189 Wash. 590, 66 P.2d 827 (1937). Florida has specifically held that the doctrine of waiver does not apply in transactions that are forbidden by statute or that are contrary to public policy. *SHERBA BROS., INC. V. CAMPBELL,* 361 So.2d 814 (Fla. 4th DCA 1978); *MONTSDOCA V. THE HIGHLANDS BANK & TRUST CO.,* 85 Fla. 158, 95 So. 666 (1923).

CONCLUSION

The Orders and opinions of the courts of the State of

Florida clearly deprive Petitioners of the right to equal protection since they improperly apply common law principles dealing with purging usury and waiver, rather than Florida's Criminal Usury Statute. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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